

BACKGROUND AND LEGAL ANALYSIS
OF VOCATIONAL-TECHNICAL EDUCATION FUNDING
IN MONTANA

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INTRODUCTION

On December 20, 1999, an action was filed by two Cascade County taxpayers against the Montana Department of Revenue, the Cascade County Treasurer, and the Cascade County Commissioners alleging that section 20-25-439, MCA, which imposes a 1.5-mill levy on taxpayers of Cascade, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties for the support of the state's vocational-technical education program, violates the equal protection, due process, and tax equalization provisions of the 5th and 14th Amendments to the United States Constitution, Article II, sections 4, 17, and 29, of the Montana Constitution, and Article VIII, section 3, of the Montana Constitution .

This memorandum is in response to a request for a review of the legal issues surrounding the challenge of the mill levy imposed on real and personal property in the five counties in which colleges of technology are located. Part I will provide a brief overview of the laws establishing the state's vocational-technical education system and a historic look at the evolution of the five-county, 1.5-mill levy that is currently used to finance vocational-technical education in the state. The information provided in Part I is not intended as a complete review of the history or issues related to vocational-technical education in Montana, but rather is intended to provide some historical understanding of

events relevant to the litigation filed on December 20, 1999. Part II will analyze the constitutional provisions and legal arguments that are relevant to the lawsuit filed by the Cascade County taxpayers who are challenging the legality of the levy currently being imposed on the taxpayers in the five counties where vocational-technical education institutions (now colleges of technology) are located.

PART I

Establishment of the Vocational-Technical Education System

With Montana's entry into vocational education in 1919, the Legislature established a governance system that authorized the State Board of Education to cooperate with school district and county school boards in the establishment and maintenance in the public elementary and public high schools of courses in vocational training in agriculture, trades and industries, and home economics.¹ In 1939, the Legislature authorized the State Board of Education to designate applicant high schools as vocational training centers.² The Board quickly designated Glasgow, Custer County, and Helena High Schools as vocational training centers, with Havre High School being designated in 1940 and Cut Bank High School receiving designation in 1942.³ In anticipation of federal legislation changing the criteria for selecting area vocational schools, the Board rescinded center designation for Glasgow, Custer County, Havre, and Cut Bank High Schools in 1963, leaving Helena High School as the lone vocational center.⁴

The 1967 Legislature modified the language of vocational center designation and broadened the category of school districts and institutions that could apply for designation.⁵ By 1969, the State Board of Education designated four area vocational-technical schools, in Butte, Billings, Great Falls, and Missoula, in addition to the one already designated in Helena.⁶ Despite heavy lobbying by other cities wanting center designation and efforts by others arguing for designation of only one center, several attempts were made to restrict center designation to counties having a tax base of \$75 million, which would have restricted designation at that time to only three centers, with others added as needed.⁷ However, to gain support for the vocational-technical education system, the \$75 million minimum tax base was reduced to \$45 million, ensuring that all five previously designated centers would remain qualified.⁸

In 1969, the Legislature did modify the vocational centers' governance structure by providing the State Board of Education (the Board of Public Education after 1972) with substantial governance responsibilities over the centers. The Superintendent of Public Instruction was responsible for carrying out the State Board's policies for vocational education. Local school boards of trustees exercised administrative control over the centers pursuant to Board policies and administrative rules adopted by the Superintendent of Public Instruction. On the surface, however, state laws provided for a system of centers governed by the State Board of Education or, after 1972, the Board of Public Education. The system remained somewhat unchanged until 1987, when the governance of vocational-technical education was transferred to the Board of Regents.⁹ In 1995, the University System, itself, was restructured to incorporate the five vocational-technical education institutions.¹⁰ The vocational-technical centers were subsequently renamed colleges of technology, with the colleges located in Billings and Great Falls affiliated with and administered by Montana State University, and the colleges in Butte, Helena, and Missoula affiliated with and administered by the University of Montana.¹¹

Financial Support of Vocational-Technical Education

Along with the issue of how many vocational-technical education centers to support came the issue of how to provide financial support. Prior to 1969, students between the ages of 16 and 21 were eligible to attend without paying tuition and were counted in the average number belonging (ANB) formula.¹² State aid at this time was fixed on a per-student basis. Those counties without centers were required to pay tuition for attendance of their students at the centers. However, many believed this system of financial support for the vocational-technical education system was unsatisfactory. Rural counties without vocational-technical education centers felt that requiring tuition payments for their students who attended centers was a financial burden.¹³ While some believed that postsecondary vocational students should not be counted in the state's ANB formula, others felt that the ANB, state, and federal aid did not cover costs, especially since students over the age of 21 could not be counted in the state's ANB formula.¹⁴ As a result, school districts with centers feared that the pre-1969 financing system would cause soaring increases in tuition, driving students away and further restricting postsecondary vocational-technical education opportunities.¹⁵

In 1969, the Legislature authorized a 1-mill levy in the identified five counties when the vocational-technical centers were under the authority of the local school boards and the Superintendent of Public Instruction.¹⁶ In 1979, the levy was increased to 1 1/4 mills for that calendar year and to 1.5 mills in 1980 and thereafter.¹⁷ In 1987, when the governance of vocational-technical education was transferred to the Board of Regents, the levy remained at 1.5 mills but was made mandatory.¹⁸ After the University System was restructured in 1995 to incorporate the vocational-technical institutions, the five-county, 1.5-mill levy was reenacted with the provision that the funds from the mill levy were required to be deposited in the general fund and distributed for vocational-technical education on the basis of budgets approved by the Board of Regents.¹⁹

Following the merger of the vocational-technical institutions into the University System, the legality of continuation of the 1.5-mill levy was raised on several occasions in 1998 before the Joint Committee on Postsecondary Education Policy and Budget.²⁰ At its May 18 meeting, Greg Petesch, Legislative Services Division Legal Counsel, informed the Committee that while the 1.5-mill levy statute was considered constitutional until challenged, the imposition of a 1.5- mill levy on five counties to support particular institutions within the University System could be subject to challenge on the grounds that the state was violating the uniformity of taxation requirement as applied to property taxation within the context of equal protection of laws as required by the Montana and United States Constitutions by levying disparate numbers of mills on taxable property within a taxing jurisdiction.²¹ However, because the Board of Regents and the University System were in the midst of a 6-mill levy campaign, which had assured voters that renewal of the levy would not constitute a property tax increase,²² no changes in the current funding structure were proposed. In July 1998, the Subcommittee was provided with an alternative opinion, prepared by LeRoy Schramm, Chief Legal Counsel for the Commissioner of Higher Education, defending the constitutionality of continuation of the local 1.5-mill levy.²³

In the 1999 Legislative Session, legislation was introduced to eliminate the 1.5-mill levy in those counties in which a college of technology is located.²⁴ The bill passed the Montana House of Representatives, but was tabled in the Senate Finance and Claims Committee. Consequently, an action was filed on December 20, 1999, by two Cascade County taxpayers against the Montana Department of Revenue, the Cascade County Treasurer, and the Cascade County Commissioners, alleging that section 20-25-439, MCA, which imposes the 1.5-mill levy on taxpayers of Cascade, Lewis and Clark, Missoula, Silver Bow, and Yellowstone counties for the support of the state's

vocational-technical education program, violates the equal protection, due process, and tax equalization provisions of the 5th and 14th Amendments to the United States Constitution, Article II, sections 4, 17, and 29, of the Montana Constitution, and Article VIII, section 3, of the Montana Constitution.²⁵

The taxpayers are asking the court to declare section 20-25-439, MCA, unconstitutional under both the federal and state constitutions, to order the county commissioners of the five affected counties to cease levying the 1.5 mills, to order the county treasurers, the Department of Revenue, or the Board of Regents to return to taxpayers all taxes unlawfully collected under the provisions of section 20-25-439, MCA, to award attorney fees and court costs, and to assess a pro rata share of their attorney fees and costs against either the state or the taxpayers of the counties that are benefitted by the litigation.

PART II

Legal Analysis of the Vocational-Technical Education Mill Levy

Uniformity of Taxation Requirement

Over the years, the Montana Legislature has used statewide property tax levies to comply with Article X, section 1(1), of the Montana Constitution, which guarantees every person in the state equality of educational opportunity.²⁶ The Montana Supreme Court applied this provision in 1989 when it determined that the existing spending disparities among the state's elementary and secondary public school districts translated into a denial of equality of educational opportunity and required that equal tax effort must be applied statewide to equalize educational opportunity in its elementary and secondary public school system.²⁷ In 1973, the Legislature imposed a statewide 40-mill levy property tax²⁸ to implement the requirement of Article X, section 1(3), that the state fund its share of primary and secondary education, while the 6-mill levy was chosen as the method for funding a portion of the costs of the state's University System.²⁹

In 1974, Fallon County challenged the legality of a 40-mill levy for school equalization, arguing that Article X, section 1(3), of the Montana Constitution, required the Legislature to fund its share of the cost of education solely from the traditional sources of foundation program funding, which was limited to oil and gas royalties, income taxes, and corporation license taxes or other traditional general

fund sources. In ruling that the taxpayers' view was incorrect, the Montana Supreme Court, in State ex rel. Woodahl v. Straub,³⁰ stated:

. . . The only mandate contained in Art. X, Sec. 1(3), Montana Constitution 1972, is that the legislature fully fund the state's share of the cost of basic education. It is silent as to the means the legislature may employ for this purpose. By enacting Chapter 355, the legislature elected to employ a statewide property tax. ***While the wisdom of that legislative choice may be questioned, its constitutional validity may not. That other sources of revenue may be available, such as severance, excise and sales taxes as suggested, is true. But, the legislature has chosen property taxes to the dismay of many property owners.*** As our foregoing discussion indicates, the legislature could adopt a property tax and having done so it is free to use the proceeds realized by the tax for any public purpose, including the fulfillment of the duty to fund public education.³¹ (emphasis added)

The Straub decision upheld the statute levying a general property tax for educational purposes and requiring that excess funds be remitted to the state. The Montana Supreme Court also stated in Straub that the only limitation on the state's power to tax that was applicable to the taxpayer's challenge was Article VIII, section 1, of the Montana Constitution, which requires that taxes be levied by general laws for public purposes. The Court concluded that because Chapter 355, Laws of 1973, required all property to be levied on at the same rate, it was clearly a general law.³² The Straub court quoted, with approval, the case of Sweetwater County Planning Comm. v. Hinkle,³³ in which it was held:

We see no manner in which ad valorem taxes for school purposes can be made equal and uniform unless done on a state-wide basis. In other words, ***all property owners within the state should be required to pay the same total mill levy for school purposes.***³⁴ (emphasis added).

This "uniformity of taxation" requirement was expressly provided for in Article XII, section 11, of the 1889 Montana Constitution, and provided:

Taxes shall be levied and collected by general laws and for public purposes only. ***They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.*** (emphasis added)

When the 1972 Montana Constitution was adopted, the comparable provision codified at Article VIII, section 1, eliminated the second sentence from the 1889 section and stated only that "[t]axes shall be levied by general laws for public purposes". As reported in the Constitutional Convention's Revenue and Finance Committee's written report, the uniformity provision in the second sentence of the 1889 Constitution was eliminated because "uniformity of taxation is already required of the states through the 14th Amendment to the United States Constitution".³⁵ So, despite removal of the language from the 1972 Constitution, uniformity of taxation continues to apply to property taxation in states through the equal protection of the laws as required by Article II, section 4, of the Montana Constitution, and the 14th Amendment to the United States Constitution, and within the requirement for taxation by general laws as provided in Article VIII, section 1, of the Montana Constitution. Additionally, the Montana Supreme Court has stated that uniformity of taxation among like taxpayers on like property is still a constitutional necessity under Article VIII, section 3, of the Montana Constitution.³⁶

As a result of these court cases, critics argue that current law, which mandates the 1.5-mill levy on only the five counties in which colleges of technology are located, rather than applying the mills statewide, unconstitutionally discriminates against taxpayers in the affected five counties.

Equal Protection: The Rational Basis Test

While citing the same constitutional provisions discussed in the "uniformity of taxation" section, LeRoy Schramm, Chief Legal Counsel to the Commissioner of Higher Education, in a memorandum defending the constitutionality of imposing the 1.5-mill levy on the five counties argued that the constitutional validity of a tax is no longer governed by the old "uniformity" test of the Montana Constitution, but rather is governed by the equal protection test found in the 14th Amendment to the United States Constitution and Article II, section 4, of the Montana Constitution.³⁷ Under this theory, Mr. Schramm noted that the federal courts subject state taxation to only a minimal rationality standard of review under the equal protection clause. Although the Montana Supreme Court has stated that the equal protection clause of the Montana Constitution places some limits on taxation disparities, Mr. Schramm argues that the Court has consistently deferred to legislative judgment on the issue of whether a legislative classification violates the Constitution.³⁸ As a result, the Montana Supreme Court has stated that tax classifications need only meet the "rational basis" test to pass equal protection muster.³⁹

Under a "rational basis" test, the validity of the local 1.5-mill levy depends on whether the classification of the five counties is related to a legitimate government interest.⁴⁰ As stated by Mr. Schramm:

. . . The colleges of technology, even though under the administrative umbrella of the University System, continue to have a mission that is to a significant degree geared to the local labor market. This special focus on local vocational and technical needs makes it reasonable to look to the community to assume, through the mill levy, part of the burden of financing the institution. . . .⁴¹

While Article VIII, section 1, of the Montana Constitution requires that taxes be levied by "general law", the Montana Supreme Court has held that general law need not impact every entity within the taxing jurisdiction the same way.⁴² In this case, Mr. Schramm argues that:

. . . This levy may affect only 5 counties, but that does not make it a special law if there is a rational basis for creating a classification that includes only counties which contain special purpose vo-tech institutions. It is then a general law affecting all within the rationally derived class in the same manner.⁴³

Moreover, it is argued that "because the 4 year units do not explicitly have a mission to serve the local labor market a levy in the 4 year communities would have to rest on a somewhat different justification than does the vo-tech levy".⁴⁴ As a final analysis, Mr. Schramm states that "while its validity rests upon a showing that the 5 county classification is not irrational, the judicial deference generally given to legislatures in establishing tax classes means that the tax is not unlikely to survive if its constitutionality were to be tested".⁴⁵

CONCLUSION

In addressing the issues raised by Cascade County taxpayers challenging the 1.5-mill levy imposed in five counties for support of the colleges of technology, the court will address the constitutional provisions and legal arguments raised by the Cascade County taxpayers and discussed in Part II. While it is dangerous to speculate or predict the outcome of litigation, the arguments raised by the Cascade County taxpayers are not without merit.

The 1.5-mill levy imposed on the five counties in which colleges of technology are located is a carryover from the time when vocational-technical education was linked to local school districts and was not considered a part of either the state's system of basic education or the state's University System. While it is true that colleges of technology may have missions that are "geared to the local labor market" and may have an economic impact on the local community, that argument would be stronger if enrollment preferences were given to residents of communities with colleges of technology or if statistics provided evidence that graduates remained and obtained jobs in those local communities. However, the programs offered by the colleges of technology are open to all citizens of the state regardless of residence and no statistics have been offered to indicate that graduates of the colleges of technology subsequently remain and are employed in the affected counties.

Moreover, the theory that the vocational-technical education institutions should be funded at the local level because of their enhancement of the "local labor market" was more compelling before 1995. With passage of Senate Bill No. 156, the 1995 Legislature not only transferred the governance of the state's vocational-technical education program to the Board of Regents, but it also restructured the University System to incorporate the vocational-technical education institutions into the System. Pursuant to its authority under Article X, section 9(2), the Board of Regents subsequently redesignated the vocational-technical education institutions as colleges of technology, with colleges located in Billings and Great Falls affiliated with and administered by Montana State University, and those in Butte, Helena, and Missoula affiliated with and administered by the University of Montana. As a result, the colleges of technology may still have a mission that is "geared to the local labor market", but the colleges themselves are no longer local institutions simply assigned to the Board of Regents, rather they are now part of the state's University System.

In the end, the court will have to determine whether former vocational-technical education institutions, despite their merger into the state's University System, continue to have a separate mission that is geared to the local labor market. If not, it becomes difficult to argue that a rational basis exists for funding five units of the state's University System by a local 1.5-mill property tax while the remainder of the units within the System are funded by the statewide 6-mill levy. Consequently, the court could determine that continuation of the local 1.5-mill levy to support what is now the state vocational-technical education program unconstitutionally discriminates against the taxpayers in Cascade, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties.

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ENDNOTES

1. Section 2, Chapter 192, L. 1919, p. 400.
2. Section 1, Chapter 160, L. 1939, p. 384.
3. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 12.
4. Ibid.
5. Ibid.
6. Ibid.
7. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 13.
8. Ibid.
9. House Bill No. 39, Chapter 658, L. 1987.
10. Senate Bill No. 156, Chapter 308, L. 1995.
11. Memorandum to Commissioner of Higher Education Richard Crofts from LeRoy Schramm, Chief Legal Counsel, providing background and constitutional considerations on the five-county, 1.5-mill levy for vocational-technical education, July 7, 1998 (hereinafter Schramm Memorandum).
12. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 12.
13. Id., p. 13.
14. Ibid.
15. Ibid.
16. House Bill No. 481, section 9(2), Chapter 250, L. 1969.
17. House Bill No. 634, section 4, Chapter 598, L. 1979.
18. House Bill No. 39, section 18, Chapter 658, L. 1987.
19. Senate Bill No. 156, section 34, Chapter 308, L. 1995.

20. See memorandum from Sandy Whitney, Senior Fiscal Analyst, Montana Legislative Fiscal Division, to the Joint Committee on Postsecondary Education Policy and Budget, May 5, 1998; see also Joint Committee on Postsecondary Education Policy and Budget Minutes, May 18, 1998 (hereinafter Minutes).

21. Minutes, May 18, 1998, pp. 4-5; see also, January 23, 1996, letter from Greg Petesch, Legal Counsel, Montana Legislative Services Division, to Senator Bob Brown outlining the uniformity of taxation requirement for taxpayers on like property.

22. Minutes, May 18, 1998, p. 5.

23. Schramm Memorandum, p. 5 (stating that due to the judicial deference generally given to legislatures in establishing tax classes "the tax is not unlikely to survive if its constitutionality were to be tested").

24. House Bill No. 433, 1999 Legislature.

25. Kottel v. Montana Dept. of Revenue, et al., Eighth Judicial District, Cascade County, Cause No. CDV-99-1356.

The 5th Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 14th Amendment of the United States Constitution, in part, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law**, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Article II, sections 4, 17, and 29, of the Montana Constitution, in part, provide:

Section 4. Individual dignity. The dignity of the human being is inviolable. No

person shall be denied the equal protection of the laws. . . .

Section 17. Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 29. Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Article VIII, section 3, of the Montana Constitution, provides:

Section 3. Property tax administration. The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

26. Article X, section 1(1), Montana Constitution, provides: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."

27. Helena Elementary School District No. 1 v. State of Montana, 236 Mont. 44, 769 P.2d 684 (1989).

28. House Bill No. 28, section 50, Chapter 11, Sp. L. June 1989, codified at 20-9-360, MCA.

29. Sec. 1, Ref. No. 75, app. Nov. 7, 1978; amd. sec. 1, Ref. No. 106, app. Nov. 8, 1988; amd. Ref. No. 113, app. Nov. 3, 1998.

30. 164 Mont. 141, 520 P.2d 776 (1974).

31. Straub, id., at 148-149.

32. Straub, id. at 148.

33. 491 P.2d 1234, 1237 (Wyo. 1971).

34. Straub, id. at 152.

35. See Verbatim Transcripts, Montana Constitutional Convention, Vol. II, p. 582.

36. Dept. of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 270, 587 P.2d 1282 (1978).

37. Schramm Memorandum, p. 3.
38. Ibid.
39. Ibid, citing State v. Sunburst Refining Co., 73 Mont. 68, 79 (1925), and Montana Stockgrowers v. Dept. of Revenue, 238 Mont. 113, 77 P.2d 285 (1989).
40. Schramm Memorandum, p. 3.
41. Id. p. 4.
42. Ibid, citing D & F Sanitation v. City of Billings, 219 Mont. 437, 441 (1996); State v. Sunburst Refining Co., 73 Mont. 68 (1925); and Montana Stockgrowers v. Dept. of Revenue, 238 Mont. 113, 77 P.2d 285 (1989).
43. Ibid.
44. Schramm Memorandum, pp. 4-5.
45. Id., p. 5.